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THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Comments and observations received from States

ADDENDUM

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NETHERLANDS

PART I

GENERAL COMMENTS

1. Before examining each article individually, the Netherlands Government would first give a general assessment of the draft articles as a whole and make a number of general comments relating to the nature of the instrument to be proposed after adoption at second reading, some inconsistencies, and a number of issues on which regulations have not been included.

General assessment

2. The Netherlands Government is of the general opinion that the draft articles should be assessed as positive. The ILC has formulated most adequate regulations on these very complex issues.

3. To be more specific, however, the Netherlands Government would observe that its assessment of the draft as a whole and of the articles individually depends to a significant extent on whether the draft should be regarded as a draft recommendation, a draft declaration or a draft treaty. For the reasons referred to in paragraph 4, the Netherlands Government believes that preference should be given to the first of these opinions, namely that the draft be regarded as a draft recommendation. In this event, the Netherlands Government deems the draft satisfactory and, subject to some amendments, would favour its adoption.

Part II of this report examines those articles which should be amended. However, if it is finally decided to convert the draft articles into a draft treaty, the Netherlands Government would observe that other parts of the draft would require amendment and the text would thus need to be re-examined.

Nature of the instrument

4. As stated at paragraph 3, the Netherlands Government is of the view that the draft articles should not be converted into a legally binding instrument, but that they should be adopted as a recommendation by the General Assembly of the United Nations. The Netherlands Government acknowledges that a number of arguments may be put forward in favour of converting the draft into a treaty. Legally binding regulations on the uses of international watercourses could, in a number of cases, help to clarify the rights and obligations of riparian States and thus contribute towards international agreement on the use of international watercourses. In some parts at least, the issue covered by the draft articles has been sufficiently refined to warrant regulation within a treaty.

5. However, the Netherlands Government attaches greater weight to the case for a form which is not legally binding. In particular, the Netherlands

Government questions whether the issue involved lends itself to a worldwide treaty which specifies the rights and obligations of States to a sufficient degree, in view of the differences between rivers, the largely opposing interests of upriver and downriver States and the great differences between regions, it will be no easy matter to reach agreement on a framework treaty which included such specific provisions. For these reasons, the Netherlands Government would give preference to the incorporation of the draft articles in a recommendation providing guidelines for the conclusion of binding agreements on individual watercourses.

6. In this connection, the Netherlands would observe that the choice of a recommendation does not preclude parts of the draft articles from being regarded as a reflection of existing customary law.

Inconsistences

7. The Netherlands Government notes that a number of inconsistencies occur in the way in which the articles have been formulated. In some cases, no apparent reason can be found for these inconsistencies. In other cases, reasons may well exist, but are insufficiently clarified in the accompanying commentary. The inconsistencies relate in particular to the way in which obligations are qualified. It is not always clear why, in the articles concerned, different adjectives are used to qualify obligations. For example, article 21, paragraph 2, obliges States to prevent the occurrence of "appreciable harm", article 24 refers to the prevention of circumstances that are "harmful" and article 25 relates to situations in which "serious harm" may occur. In a number of cases, the reasons for the various modifications given to thresholds are clearly indicated and are convincing (for example in the case of the notification threshold in article 12), but in other cases a satisfactory commentary is not given.

8. In the opinion of the Netherlands Government, the draft articles would gain in clarity if the terminology used were consistent. Whenever a different formulation is chosen the commentary should indicate the reasons and the affect it will have on the substance and extent of the obligations in question.

Issues not included in the regulations

9. The Netherlands Government is of the view that a number of issues have wrongly been excluded from the draft articles. It would mention in this connection the lack of a provision on environmental impact assessment (see Part II, paragraph 11 and, in particular, provisions on the settlement of disputes.

10. The Netherlands Government perceives the absence in the draft articles of provisions on the settlement of disputes as a shortcoming. In view of the fact that the draft articles, should they be regarded as a recommendation, will serve as a model for the establishment of treaties on individual watercourses, the Netherlands Government regards a reference to suitable and effective regulations for the settlement of disputes as essential.

PART II

COMMENTS ON THE INDIVIDUAL ARTICLES

Article 1: Scope of the present articles

11. With regard to the term "uses of international watercourses", the Netherlands Government deems it desirable for the commentary to the draft articles to indicate that it is subject to a broad interpretation. Although, for example, the construction of dykes by an upriver State to counter possible damage to its land may affect the use of water by the downriver State, such an activity may not be regarded as a "use" within the meaning of article 1. In view of the close connection between such activities and the issues regulated in the draft articles, the commentary should be adapted accordingly.

Article 2: Use of terms

12. With regard to article 2, the Netherlands Government would observe that the use of the term "watercourse" may lead, in practice, to a lack of clarity. According to this definition, the Maas and the Rhine, which flow into a common terminus, should be regarded as one watercourse. Although the riparian States may themselves define the extent to which they wish to cooperate under the provisions of article 3, in the absence of such agreements a number of the obligations contained in the draft agreement will apply to the watercourse as a whole. This problem could be solved if the definition were to be altered to the effect that those watercourses which follow their own course but flow into a common terminus are to be regarded as separate watercourses for the purposes of the draft articles. An alternative solution would be to delete the words "and flowing into a common terminus", although this would entail the loss of a restrictive element.

13. The Netherlands Government would observe that this article does not define where a watercourse terminates in seaward direction. This may occasionally be of importance to the scope of the draft articles, and it might therefore have been desirable to examine the matter, in the commentary at least.

Article 3: Watercourse agreements

14. The Netherlands Government would observe that in the event of the draft articles finally being submitted as a treaty for ratification, the words "apply" in paragraph 1 and "application" in paragraph 3 are superfluous and should be deleted. No objection is made to their retention in the event of the draft articles being submitted as a recommendation.

Article 6: Factors relevant to equitable and reasonable utilization

15. The Netherlands Government would observe that the criterion "potential uses of the watercourse" in article 6(d) has not been further defined. It deems it relevant to emphasize that not every conceivable future use can be taken fully into account in the consideration of interests on the basis of

article 6. Only potential uses which may be regarded as feasible in the near future may be considered.

Article 7: Obligation not to cause appreciable harm

16. The Netherlands Government regards it as desirable for the commentary to emphasize that this is a due diligence obligation which does not imply strict liability. A similar clarification has in fact been included in the commentary accompanying a number of the other articles, to wit article 21, paragraph 2, article 24 and article 28, paragraph 1.

Article 10: Relationship between uses

17. In the opinion of the Netherlands Government, the words "or custom" in paragraph 1 of this article should be deleted or at any rate qualified. In its present form, article 10 could lead to absolute priority being given to existing uses over new uses. The Netherlands Government regards this as an undesirable construction. Moreover, such a priority would not be consistent with article 6, paragraph 1, which stipulates that existing uses constitute only one of the factors to be taken into consideration. This is, of course, different if the protection of existing uses is based on a rule of (regional) customary law. The commentary could contain a separate provision to cover this eventuality.

Article 16: Absence of reply to notification

18. The Netherlands Government would observe that it is unclear how the liabilty of the notifying State will be affected in the event of the notified State failing to respond to the notification. According to this article, the notified State retains scope to hold the notifying State liable under the provisions of articles 5 to 7. According to the commentary the notified State's failure to respond may be interpreted as tacit consent. It might therefore be regarded as inconsistent if the said State were then to invoke draft articles 5 to 7 at a later date should the notifying State conduct the activities in accordance with the notification.

19. In the opinion of the Netherlands Government, the procedural obligations contained in article 12 ff do not in principle affect the substantive obligations contained in articles 5 to 7. The regulation proposed by the ILC should therefore be maintained. Failure to respond to a notification may, of course, affect the extent to which the notifying State may foresee damage arising from its planned activity and thus the extent to which it may be held liable. The Netherlands Government therefore regards it as desirable that the commentary accompanying article 16 should make it clear that failure to respond may not automatically be interpreted as consent.

Article 20: Protection and preservation of ecosystems

20. The Netherlands Government would observe that the relationship between draft article 20 and the other articles contained in Part IV should be clarified. The commentary, to wit, "in view of the general nature of the obligation contained in this article, the Commission was of the view that it should precede the more specific articles in Part IV", leads to the conclusion

that the purpose of the article is not to grant individual subjective rights but to serve as an introduction to the further provisions of Part IV. In the Netherlands Government's view, a separate obligation to protect the ecosystems of international watercourses is required to supplement the obligations arising from the subsequent, more specific provisions of Part IV. This obligation should relate inter alia to the protection of fauna and flora, including the preservation of diversity of species, insofar as this is not guaranteed by the obligation to prevent pollution.

21. The Netherlands Government would observe that article 20 has been formulated in more general terms than article 21, paragraph 2. In particular, it does not contain restrictive definitions such as "appreciable harm". Should it indeed be the intention to attach a separate meaning to article 20, the Netherlands Government would recommend that the scope of the obligation be defined and the reasons for possible differences with article 21, paragraph 2 be indicated.

22. In this connection, the Netherlands Government would observe that a definition of the ecosystem has been included in the commentary only. This article therefore departs from other draft articles which themselves contain a definition of those terms determining the obligation in question. Should article 20 indeed be interpreted as a provision from which subjective rights may be derived, the Netherlands Government would regard it as essential that the term ecosystem be defined more precisely, particularly if the draft articles were ultimately to lead to a treaty.

Article 21: Prevention, reduction and control of pollution

23. The Netherlands Government would observe that the wording of the objectives of article 21, paragraph 2 should be altered. The obligation "(to) prevent, reduce and control pollution" should be replaced by the obligation "(to) prevent, reduce or control pollution" in view of the fact that these measures cannot be taken simultaneously.

24. The Netherlands Government regards it as important that the observations made with regard to article 7 concerning the due diligence nature of the obligation should also apply to article 21, paragraph 2. The commentary accompanying article 21, paragraph 2 would seem to imply that the due diligence element is restricted to the obligation "(to) ... reduce and control pollution ...", leaving it unclear as to whether another standard is to be applied to prevention. The fact that there is no question of liability in this case either should be clarified.

Article 24: Prevention and mitigation of harmful consequences

25. As stated in Part I, the Netherlands Government would observe that, in contrast to article 21, paragraph 2, this obligation is not restricted to a prohibition of activities leading to appreciable harm but relates to all harmful consequences. The Netherlands Government regards it as desirable that an explanation be given of the reasons for this distinction.

26. Partly in view of the inconsistent wording, the Netherlands Government regards the distinction drawn between the obligations contained in article 21,

paragraph 2, in particular those relating to "harm to human health or safety", and those contained in article 24, in particular those relating to "water-borne diseases", as insufficiently clear. The Netherlands Government would regard it as desirable that the application of article 24 should be limited to damage arising from causes other than pollution. In addition, the Netherlands Government is of the opinion that the obligations relating to pollution and other causes of damage be harmonized.

Article 25: Emergency situations

27. The observation relating to the wording of article 21, paragraph 2 applies in this case too: the word "and" in "prevent, mitigate and eliminate pollution" should be replaced by the word "or".

Article 26: Management

28. The Netherlands Government would observe that article 26 does not refer to the desirability or need to insitutionalize cooperation betweeen riparian States. In view of the importance attached in practice to institutions such as river commissions, the Netherlands Government perceives this to be a shortcoming. The Netherlands Government regards it as desirable that article 26 be amended in this respect by the inclusion of a reference to opportunities to institutionalize cooperation and by ensuring that under "joint mechanisms" provision is made for the establishment of river commissions and other possible institutional frameworks, particularly if the draft articles are to be converted into a recommendation.

Article 27: Regulation

29. In the opinion of the Netherlands Government, the words "where appropriate" should be deleted from paragraph 1 of this article, as they entail an unwanted restriction of the scope of the obligation to cooperate.

30. For the sake of consistency with, for example, article 21, preference should be given to inclusion in paragraph 1 of the definition now contained in paragraph 3.

Article 29: International watercourses and installations in time of armed conflict

31. In view of the fact that this article does not envisage imposing new obligations but serves only to remind States of the application of the law concerning armed conflict, it will probably have no practical implications. It is also questionable whether the riparian States of international watercourses will elaborate this provision in specific agreements they conclude to implement the framework treaty to which these draft articles are intended to lead. It would probably be preferable to delete this article.

Article 30: Indirect procedures

32. The Netherlands Government regards the proposed formulation of this article as unsatisfactory, in particular, the qualification in the concluding words "accepted by them" could lead to the obligation having no practical

significance. The obligation would be reinforced if these words were replaced by "available to them" or if they were deleted entirely.

Article 32: Non-discrimination

33. The Netherlands Government would observe that the scope of article 32 is very limited. The article only prohibits discrimination in relation to access to judicial or administrative procedures, but it does not stipulate that such access must be available. The Netherlands Government would regard it as desirable that article 32 be amended to ensure the availability of national judicial procedures providing for access to procedures and possibly rights to compensation. In addition, this would bring the draft articles more closely into line with the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

PART III

SPECIAL POINTS

Compulsory cooperation and institutional regulations

34. The Netherlands Government regards as largely satisfactory the obligations to cooperate as stipulated in the draft articles. Comments on articles 13 and 16 were made previously in Part II of this report.

35. The Netherlands Government would observe that articles 11 to 19 concerning the procedural rights and obligations applicable when States plan to undertake activities which might affect other States overlap to some extent with the obligations laid down in the Convention on Environmental Impact Assessment in a Transboundary Context of 27 February 1991 (Espoo Convention). In some respects the obligations are not entirely consistent. Paragraphs 43 to 45 concerning the connection with State practice contain some observations on this matter.

36. As it already noted with regard to the observations on article 26, the Netherlands Government regrets that the draft articles contain very few provisions with regard to institutional regulations and is of the opinion that they should be amended in this regard. Reference may also be made to the Convention on the Protection and Use of Transboundary Water Courses and International Lakes (The Helsinki Convention) of 18 March 1992 in which provision is expressly made for the "establishment of joint bodies" to which certain responsibilities have been assigned.

The terms "equitable use" and "pollution"

37. Apart from the remarks contained in Part II of this report, the Netherlands Government would regard the provisions relating to equitable use (arts. 5 and 6) and pollution (in particular art. 21) as satisfactory. However, some comments on the relationship between these provisions are deemed desirable.

38. The regulation envisaged by the ILC lends priority to article 21 over the principle of equitable use. Article 21, paragraph 2 does not make an

exception for appreciable harm caused by activities conducted in accordance with this principle. The Netherlands Government concurs with this construction. The importance currently attached within many international frameworks to the prevention of transboundary water pollution appears difficult to reconcile with a regulation which regards such pollution, even if it led to appreciable harm, as lawful in view of the interests involved in the activity giving rise to it. Even the more recent conventions provide no point of contact. Although equitable use is regulated in the Helsinki Convention, the latter does not appear to subordinate it to the ban on appreciable harm.

39. However, the Netherlands Government regards the relationship between the provisions relating to equitable use and the ban on appreciable harm contained in article 7 as less satisfactory. In this case too, the ILC would seem to give priority to article 7; this is evident from both the unconditional formulation of the article and the accompanying commentary, according to which the use of a watercourse is inequitable prima facie if it causes appreciable harm to another State. This option has the advantage of providing a certain measure of objectivity. Article 7 has been formulated in considerably less flexible terms than article 5. Should appreciable harm be caused, a consideration of interests under the provisions of article 5 is no longer relevant. However, attention should be drawn to the possible consequences of this regulation.

40. As existing uses of a watercourse are protected against the appreciable harm new uses might give rise to, the draft articles would seem to give priority to existing uses over new uses. Partly as a result of this, the downriver States would enjoy a stronger position than they would under the principle of equitable use. In addition, if it is accepted that the definition of unlawfulness under article 7 may conflict with the outcome under article 5, the proposed regulation may have an undesirable effect in that the draft articles stipulate an outcome that is "inequitable". Finally, the construction chosen departs from what is largely regarded as customary law doctrine, as formulated in the ILA's Helsinki Rules of 1966, under which the principle of equitable use has priority. In view of these considerations, the Netherlands Government regards it as desirable that the relationship between article 5 and article 7 be adjusted with a view to permitting appreciable harm if it is reconcilable with the principle of equitable use.

Environmental impact assessment

41. The Netherlands Government has established that the draft contains no explicit provisions on the matter of environmental impact assessment. A number of provisions are, however, relevant, in particular those which relate to notification and consultation (see para. 35) and which serve to establish the transboundary effects of planned measures. These may be regarded as elements of environmental impact assessment procedures.

42. The Netherlands Government perceives the absence in the draft articles of specific provisions on environmental impact assessment as a shortcoming. The inclusion of a general provision recommending that environmental impact assessments be conducted is desirable.

State practice

43. The Netherlands Government would observe that a number of the draft articles relate to issues already dealt with in the obligations arising from existing conventions. Reference has already been made to differences between the provisions of the draft article and those of, in particular, the Espoo Convention and the Helsinki Convention. A number of the differences may be regarded as improvements.

44. The above applies, for example, to article 12, which obliges States to give notification in cases in which their activities might lead to appreciable adverse effects in other States. This criterion represents a departure from the "appreciable harm" criterion which, under the provisions of draft articles 7 and 21, paragraph 2, is the determining factor in establishing the lawfulness of activities. Bringing the criteria into line would have the undesirable consequence of obliging a notifying State to give notification that it was planning to commit an unlawful act. Article 12 is therefore more satisfactory than the corresponding provisions of the Espoo Convention which links the obligation to avoid "significant adverse transboundary impact from proposed activities" to the obligation of States to give notification of activities which may lead to "significant adverse transboundary impacts".

45. On some points, the draft articles represent an unfavourable departure from existing conventions. This applies to article 32, which provides the public with less protection than the Espoo Convention, and to draft article 26, which, due to the failure to include a provision on institutionalized cooperation, compares unfavourably with the Helsinki Convention. In addition, there are no references to the principle of precaution, which is enshrined in the Helsinki Convention, or to environmental impact assessments, provisions on which are not only contained in the Espoo Convention, but also in the Helsinki Convention.